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Nos. 94-1361, 94-1477

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, Individually and as executrix of the estate of Muriel A.M.S. Kole, and MURIEL MAHALEK,

Petitioners/Cross-Respondents,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent/Cross-Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT/CROSS-PETITIONER

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15 pp

Respondent/Cross-Petitioner KOREAN AIR LINES CO., LTD. ("KAL") submits this supplemental brief pursuant to Sup. Ct. Rule 25.5 to bring to the Court's attention the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Alcabasa v. Korean Air Lines Co., Ltd.*, 62 F.3d 404 (D.C. Cir. 1995), which was decided after KAL's Brief was filed.[1]

The *Alcabasa* decision was rendered in another case arising out of the destruction of KAL flight KE007 on September 1, 1983. The Court of Appeals in *Alcabasa* addressed the issue of whether "a relative of a passenger killed when Korean Air Lines flight 007 crashed into the Sea of Japan has standing to bring a wrongful death suit against the airline without first being appointed the deceased's 'personal representative' by a state court." 62 F.3d at 404-05 (A2a). The district court had dismissed the action upon the basis that (1) standing under the Warsaw Convention[2] is determined in accordance with "local law" and (2) the applicable "local law" was the law of the District of Columbia, which allows only the personal representative of a decedent to bring an action for wrongful death. 62 F.3d at 405 (A3a). The Court of Appeals affirmed the dismissal, but on the basis of a different analysis.

The Court of Appeals held that when an international treaty leaves a particular policy determination to the laws of the contracting states, the treaty refers to the laws of the nations that are signatories to the agreement and not to the laws of the political subdivisions of a signatory state. 62 F.3d at 407 (A6a-7a). As the death in *Alcabasa* occurred on the high seas, the court found that the Death on the High Seas Act

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[1] *Alcabasa* was decided on August 8, 1995 and KAL's brief was filed on July 1, 1995. The opinion in *Alcabasa* is reproduced in the Appendix hereto at A1a. References preceded by "A" refer to pages in the Appendix.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502.

("DOHSA"), 46 U.S.C. App. § 761 *et seq.*, directly applied in determining standing to sue in an action involving the Warsaw Convention. 62 F.3d at 406-07 (A6a). Under § 761 of DOHSA, only the personal representative of a decedent has standing to bring a wrongful death action. Therefore, the Court of Appeals affirmed the dismissal of the action by the district court, but on the basis of DOHSA and not upon the basis of the law of the District of Columbia relied upon by the district court.

While *Alcabasa* involved only the issue of standing, the rationale of the Court of Appeals lends further support to the argument that DOHSA is the applicable national law for the determination of the elements of recoverable damages for deaths occurring on the high seas, during the course of transportation governed by the Warsaw Convention:

1. The Court of Appeals in *Alcabasa* found that DOHSA applies to Warsaw Convention death actions involving aircraft accidents on the high seas. 62 F.3d at 406-07 (A6a).

2. The *Alcabasa* decision rebuts the arguments of Petitioners/Cross-Respondents ("Plaintiffs") and the *Amici* for Petitioners that DOHSA is not relevant to the damage issues left by the Convention for determination by national law.[3]

3. The *Alcabasa* court rejected the argument that, because the Warsaw Convention does not specify who has standing to sue, a court has the discretion to disregard an applicable federal statute and create the law as it sees fit. 62 F.3d at 407 (A8a). The court in *Alcabasa* explained:

> This position reveals a fundamental misunderstanding of the text of the Warsaw Convention and of our role as

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[3] *See* Brief for Petitioners/Cross-Respondents at 15-22; Brief *Amicus Curiae* of the Plaintiffs' Committee in *In re Air Crash Disaster at Lockerbie, Scotland*, MDL 799 (E.D.N.Y.) ("*Lockerbie Amicus Brief*") at 23-26; Brief *Amici Curiae* of Philomena Dooley, *et. al.*, Plaintiffs in *In re Korean Air Lines Disaster*, MDL 565 (D.D.C.) ("*KAL Amicus Brief*") at 24-26.

> interpreters of the law. Under Article 24(2) of the Warsaw Convention, it is the "*contracting states* [who] decide the standing . . . of claimants. . . ." *KAL I*, 932 F.2d at 1485 (emphasis added). The relevant "contracting state" in this case is the United States.
>
> In discerning the underlying legal rule, we are bound by the applicable pronouncements of Congress. It is true that courts are often called upon to fashion common law rules to supplement maritime statutes because Congress has never enacted a comprehensive body of maritime law. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). But when "[t]he Death on the High Seas Act . . . does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Id.* Mr. Alcabasa asks us to go even a step further than supplementing Congress's pronouncement: He requests that we ignore Congress's clear determination that only a personal representative may bring a wrongful death action arising from an accident on the high seas. We, of course, must decline.

62 F.3d at 407-08 (A8a).

The argument rejected by the court in *Alcabasa* is akin to the arguments of Plaintiffs and *Amici* for Petitioners herein that because the Warsaw Convention does not specify what types of damages are recoverable, a court has the discretion to allow recovery for loss of society damages in fashioning "federal common law", even though such damages are prohibited by DOHSA. *See* Brief for Petitioners/Cross-Respondents at 17-22; *KAL Amicus Brief* at 19-22; *Lockerbie Amicus Brief* at 10-16.

The rationale of *Alcabasa* applies equally to the determination of the issue of recoverable damages. Just as DOHSA determines who has standing to sue in a Warsaw Convention case arising from a death on the high seas, DOHSA is the

applicable national law which determines the elements of recoverable damages in such a case.

Respectfully submitted,

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Dated: October 10, 1995

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 19, 1995 Decided August 8, 1995

No. 94-7013

ALEXANDER ALCABASA,
APPELLANT

v.

KOREAN AIR LINES CO., LTD.,
APPELLEE

Appeal from the United States District Court
for the District of Columbia

(No. 84cv02647)

Marvin L. Jeffers argued the cause and filed the brief for appellant.

Andrew J. Harakas, with whom *George N. Tompkins, Jr.*, and *Timothy J. Lynes* were on the brief, argued the cause for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before BUCKLEY, WILLIAMS, and RANDOLPH, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: This case presents the single question of whether a relative of a passenger killed when Korean Air Lines flight 007 crashed into the Sea of Japan has standing to bring a wrongful death suit against the airline without first being appointed the deceased's "personal representative" by a state court. The district court found that only the personal representative has standing to bring such an action. We affirm, although on the basis of a different analysis.

I. BACKGROUND

On September 1, 1983, Korean Air Lines ("KAL") flight 007, bound for Seoul, South Korea, from New York via Anchorage, strayed into Soviet airspace, was shot down by a Soviet military aircraft, and crashed into the Sea of Japan. All 269 passengers on board died. To manage the proliferation of lawsuits that followed, the Judicial Panel on Multidistrict Litigation consolidated suits against KAL from around the country and assigned the matter to the U.S. District Court for the District of Columbia for a trial on the common issue of the airline's liability. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 575 F. Supp. 342 (J.P.M.L. 1983).

At the trial, the plaintiffs argued that the KAL flight crew erred in programming a navigational system prior to departing Anchorage; that the crew must have realized the error before or shortly after leaving Anchorage; and that rather than return and face possible disciplinary action, the crew decided to continue on the programmed course in spite of a known risk that the flight might stray into Soviet airspace. *See In re Korean Air Lines Disaster of Sept. 1, 1993*, 932 F.2d 1475, 1478 (D.C. Cir. 1991) (*"KAL I"*). The jury returned a verdict of willful misconduct against KAL, which we affirmed. *Id.* at 1490. Individual actions were then

returned to their courts of origin for the determination of damages. *See Zicherman v. Korean Air Lines Co.*, 43 F.3d 18, 20 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995).

Lilia Bayona was one of the passengers killed in the tragedy. In 1984, appellant Alexander Alcabasa, who claimed to be Ms. Bayona's widower, brought a wrongful death lawsuit against KAL in the U.S. District Court for the District of Columbia. There is no dispute that Mr. Alcabasa brought the suit in his individual capacity and was never appointed to serve as the personal representative of Ms. Bayona's estate. The following year, Lilia Bayona's brother, Felino Bayona, secured an appointment as the personal representative of his sister's estate by a state court in New Jersey, where Lilia was domiciled at the time of her death. In his capacity as personal representative, Felino Bayona filed suit against KAL in the U.S. District Court for the District of New Jersey. *Felino Bayona, as Administrator ad Prosequendum and General Administrator of the Estate of Lilia Bayona v. Korean Air Lines, Inc.*, No. Civ. A. 85–3819 (D.N.J.). Mr. Bayona and KAL negotiated a settlement of $450,000, and the case was dismissed in 1993.

Meanwhile, KAL filed a motion for summary judgment in Mr. Alcabasa's suit asserting that he lacked standing to bring it because he was not the personal representative of the deceased. The district court granted KAL's motion on the basis of three legal conclusions: First, the Warsaw Convention, which governs the case, leaves the question of standing to the local law of signatory states; second, District of Columbia wrongful death law is the appropriate local law; and third, District of Columbia law permits only the personal representative of the deceased to maintain a wrongful death action. *Alcabasa v. Korean Air Lines Co.*, No. Civ. A. 84–2647 (D.D.C. Nov. 4, 1993) ("*Memorandum Opinion*"). We find that the district court applied the wrong law but reached the correct result.

II. Analysis

A. The Warsaw Convention

The parties agree that this wrongful death action arising out of an international air travel disaster is "governed by the terms of the Warsaw Convention, a multilateral treaty to which the United States has adhered since 1934." *KAL I*, 932 F.2d at 1484. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 1(1), 49 Stat. 3000, T.S. No. 876 (1934) ("Warsaw Convention"), *reprinted in* 49 U.S.C. app. § 1502 note (1988). Their dispute concerns the proper interpretation of the treaty's provisions concerning the question of standing. Articles 17 and 24 are the Convention's relevant sections. The former establishes that

> [t]he Carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft....

Warsaw Convention, art. 17, 49 U.S.C. app. § 1502 note. The latter provides:

> (2) In the cases covered by article 17 [damage actions can only be brought subject to the conditions and limits set out in the Convention], *without prejudice to the questions as to who are the persons who have the right to bring suit* and what are their respective rights.

Id., art. 24 (emphasis added).

Mr. Alcabasa contends that the "without prejudice" clause of Article 24(2) implies that all parties who have wrongful death claims against a carrier may bring separate suits. His interpretation arguably finds support in a decision of the U.S. District Court for the Southern District of New York concerning the same disaster in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 807 F. Supp. 1073 (S.D.N.Y. 1992) ("*KAL–SDNY*"). That court found that "[t]he Warsaw Convention ... does not limit recovery to the personal represen-

tative of the decedent and affirmatively provides for suit by persons other than passengers" and, in fact, cited our opinion in *KAL I* for this proposition. *KAL–SDNY*, 807 F. Supp. at 1080. For strategic reasons, KAL did not challenge this aspect of the district court's opinion in its subsequent appeal to the Second Circuit. *See Zicherman*, 43 F.3d 18. KAL argues here, however, that the *KAL–SDNY* decision was both incorrect and based on an erroneous reading of our opinion in *KAL I*.

We agree with KAL on both counts. To set the record straight, in *KAL I* we at no point discussed whether standing to bring a wrongful death suit was limited to a personal representative of a decedent, nor did we discuss the subject of personal representatives. In considering what types of damage awards were permitted by the Convention, we found that "Article 24 allows contracting states to decide the standing and respective rights of claimants who seek recovery under Article 17." *KAL I*, 932 F.2d at 1485 (internal quotation marks omitted). Our discussion established that the Warsaw Convention not only does not create a single, uniform rule of standing but, quite to the contrary, defers such determinations to the legal regimes of the signatory states. We reiterate this interpretation here and note that it conforms with the views of other circuits that have examined Article 24(2). *See In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1284 (2d Cir. 1991) ("the drafters gave up any attempt to decide who could sue" but instead limited liability "no matter how many plaintiffs were involved or what their rights were under local law"); *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 414 (9th Cir. 1983) (import of Article 24(2) is that "the question of who are the persons upon whom the action devolves in the case of death [is] to be left to local law apart from the Convention" (internal quotation marks omitted)).

B. Law Governing Standing to Sue

The novel legal question presented in this case is not whether standing must be determined by reference to the

laws of the Convention's "contracting states," *KAL I*, 932 F.2d at 1485, but what that law is in this particular context. KAL argues that the question of Mr. Alcabasa's standing is controlled by the Death on the High Seas Act ("DOHSA"), which provides in pertinent part:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State ... the personal representative of the decedent may maintain a suit for damages in the district courts of the United States....

46 U.S.C. § 761 (1988).

In *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), the Supreme Court eliminated any doubt that DOHSA is applicable to accidents involving aircraft as well as ships by applying it to a helicopter crash 35 miles off the Louisiana coast. *Id.* at 218. DOHSA applied, the Court reasoned, because the "helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an island ... to the shore." *Id.* at 219. The Court also determined that the statute preempts State law where it applies. *Id.* at 232. Because KAL flight 007's function—ferrying passengers across the Pacific Ocean—was also one "traditionally performed by waterborne vessels" and because Mr. Alcabasa does not claim that the "wrongful act" that "caused" Ms. Bayona's death did not occur on the high seas, we find that DOHSA is the applicable law of the United States in this case. Under DOHSA, only the personal representative of the deceased may bring suit for wrongful death, *see, e.g., Futch v. Midland Enters., Inc.*, 471 F.2d 1195, 1196 (5th Cir. 1973); 2 *Benedict on Admiralty* § 83(a)(1) (7th ed. 1995); and a "personal representative" is by definition a court-appointed executor or administrator of an estate, not merely an heir. *Briggs v. Walker*, 171 U.S. 466, 471 (1898). Thus, Mr. Alcabasa's attempt to sue must fail.

Although the district court correctly concluded that standing under the Warsaw Convention is determined in accordance with "local law," it erred by assuming the relevant local

law is the law of the District of Columbia. *Memorandum Opinion* at 5. When courts, including this one, determine that an international treaty leaves a certain policy determination to "contracting states," they refer to the laws of the nations that are signatories to the agreement, not the political subdivisions thereof. *See In re Mexico City*, 708 F.2d at 415 (questions of "who are the persons entitled to assert [a] cause of action [under the Warsaw Convention] may be determined by reference to . . . federal statutes"). In many instances, of course, there is no single "law of the United States"; and the structure of our federal system requires reference to the laws of the various States to determine the relevant national law. Here, however, we are dealing with a federal statute, DOHSA, that preempts state law.

We are aware that, in *Zicherman*, the Second Circuit rejected KAL's similar argument that it should look to DOHSA to determine what types of damage claims are cognizable under the Warsaw Convention. 43 F.3d at 21. Instead, it referred to federal common law "general maritime principles," which, in that case, yielded a different result than DOHSA would have. *Id.* at 21–22. The court found that it could not "reconcile DOHSA's limitation of damages to pecuniary loss with the 'aim of the [Warsaw] Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention. . . .'" *Id.* at 22 (quoting *In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804, 829 (2d Cir. 1994)). Whatever the merits of the Second Circuit's analysis of damages under the Convention, we are concerned here with the issue of standing, which Article 24 commits to the laws of the signatory states. In light of the Supreme Court's holding, in *Offshore Logistics*, that DOHSA governs tort claims arising out of accidents on the high seas, we must determine standing in accordance with its provisions.

Rather than argue that DOHSA does not apply to this case, Mr. Alcabasa asks that we ignore DOHSA and instead fashion a common law rule that would permit his suit. To do so would be equitable, he believes, because permitting only personal representatives to sue would subject the rights of

the bereaved to the vagaries of state probate law and encourage races to the probate court. The problems embodied in such a rule are illustrated, in his opinion, by the facts of this case: Mr. Alcabasa alleges that Mr. Bayona secured his appointment as his sister's personal representative by fraudulently denying Mr. Alcabasa's existence to the New Jersey probate court.

Mr. Alcabasa's plea seems to assume that because the Warsaw Convention does not specify who has standing to sue, there is no governing law and, therefore, we have the discretion to create it as we see fit. He concedes that we might look to DOHSA for guidance, but believes we need not. This position reveals a fundamental misunderstanding of the text of the Warsaw Convention and of our role as interpreters of the law. Under Article 24(2) of the Warsaw Convention, it is the "*contracting states* [who] decide the standing ... of claimants...." *KAL I*, 932 F.2d at 1485 (emphasis added). The relevant "contracting state" in this case is the United States.

In discerning the underlying legal rule, we are bound by the applicable pronouncements of Congress. It is true that courts are often called upon to fashion common law rules to supplement maritime statutes because Congress has never enacted a comprehensive body of maritime law. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). But when "[t]he Death on the High Seas Act ... does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Id.* Mr. Alcabasa asks us to go even a step further than supplementing Congress's pronouncement: He requests that we ignore Congress's clear determination that only a personal representative may bring a wrongful death action arising from an accident on the high seas. We, of course, must decline.

Although it does not bear directly upon the resolution of this case, it is worth noting that where only a personal representative may maintain a wrongful death suit, persons in Mr. Alcabasa's position are not without recourse to protect

their legal rights. Some courts have found, for example, that a potential beneficiary of a wrongful death claim may be permitted to intervene in a suit if he can establish that his interests are at odds with the decedent's personal representative. *See, e.g., Smith v. Clark Sherwood Oil Field Contractors*, 457 F.2d 1339, 1345 (5th Cir. 1972). Furthermore, a personal representative has a fiduciary duty to bargain for the rights of all the decedent's beneficiaries and to turn over to them their appropriate share of any proceeds. *See, e.g., Chicago, Burlington & Quincy R.R. v. Wells-Dickey Trust Co.*, 275 U.S. 161, 163 (1927); *Calton v. Zapata Lexington*, 811 F.2d 919, 922 (5th Cir. 1987). A failure to do either can give rise to a cause of action against the personal representative. *Calton*, 811 F.2d at 922.

III. Conclusion

Under United States law, as referenced by Article 24(2) of the Warsaw Convention, only the personal representative of Lilia Bayona may maintain a suit against KAL for her wrongful death. If Mr. Alcabasa did not receive proper compensation for the death of Ms. Bayona, he might have a cause of action against her personal representative, but he may not force the airline to litigate a claim it had a right to believe was settled in 1993. The decision of the district court granting summary judgment for KAL is therefore

Affirmed.